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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Alan D. King

File: B-295529.6

Date: February 21, 2006

William W. Thompson, Jr., Esq., Michael A. Branca, Esq., and Lori Ann Lange, Esq., Peckar, Abramson, Bastianelli & Kelley, for the protester.
David R. Johnson, Esq., Amanda J. Dietrick, Esq., and Alexander O. Levine, Esq., Vinson & Elkins, for IAP World Services, Inc., an intervenor.
Raymond M. Saunders, Esq., Department of the Army, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protester challenging, on behalf of federal employees, the outcome of a cost comparison study held pursuant to Office of Management and Budget Circular A-76, is not an interested party with standing to pursue a protest at the Government Accountability Office (GAO) where the study at issue was not initiated on or after January 26, 2005, as required by the amendment to the Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551-56 (2000) set forth at section 326(a) of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811, 1848, which authorizes the official responsible for submitting the federal agency tender in a public-private competition conducted under the Circular to be an “interested party” for purposes of filing a bid protest at the GAO.

DECISION

Alan D. King, the Deputy Garrison Commander of the Department of the Army’s Walter Reed Medical Center in Washington, D.C., protests the Army’s decision to procure base operations support services at Walter Reed using a contract awarded to IAP World Services, Inc., under request for proposals No. DADA10-03-R-0001, rather than continue to have these services performed in-house using government employees. The Army’s decision was made pursuant to procedures established by Office of Management and Budget (OMB) Circular A-76; however, the Army and

Mr. King disagree about the version of the Circular that applies here.¹ Mr. King argues that the Army's authority to use the 1999 Circular expired, and contends that, by operation of law, the study here is governed by the 2003 Circular, which Mr. King claims has been violated. Mr. King also argues that the Army violated the Anti-Deficiency Act, as well as other statutes, while conducting this cost comparison study.

We conclude that Mr. King lacks standing to pursue this protest under either version of OMB Circular A-76. As a result, we dismiss this protest because Mr. King is not an interested party to pursue it.

BACKGROUND

In June 2000, the Army announced its intent to conduct an A-76 cost comparison study of base operations support services at Walter Reed. This announcement was followed by a solicitation issued to potential private-sector offerors on June 4, 2003. Johnson Controls World Servs., Inc., B-295529.2, B-295529.3, June 27, 2005, 2005 CPD ¶ 124 at 2 (“JCWS”).²

Since this cost comparison study began in 2000, prior to issuance of the 2003 Circular (even though the solicitation was issued approximately 1 week after the Circular was revised), the Department of Defense (DOD) sought permission from OMB to proceed under the 1999 Circular. Specifically, by letter dated October 24, 2003, DOD requested permission to proceed with 205 competitive sourcing initiatives already underway pursuant to the 1999 Circular, one of which was the Walter Reed study at issue here. Protest, attach. 2 (Letter from DOD to OMB, Oct. 24, 2003) at 1. In response, by letter dated November 17, OMB advised as follows:

DOD may consider this letter as authority to proceed under a deviation for the limited purposes of completing the initiatives identified in the transition plan to the extent and with the understandings set forth in the enclosure (and, of course, in compliance with any applicable laws). The DOD Competitive Sourcing Official is responsible for ensuring use

¹ This decision addresses two versions of OMB Circular A-76. The earlier version dates from 1999 (“the 1999 Circular”); the more recent version dates from May 29, 2003 (“the 2003 Circular”). There are significant differences between these two versions of the Circular, which will be discussed, as needed, below.

² Johnson Controls became IAP World Services, Inc. as of March 30, 2005. Id. at 1 n.1. Since Johnson Controls filed its protest prior to the name change, and since the cost comparison materials addressed Johnson Controls, our prior decision referred to the company by its previous name, rather than its new one.

of the previous Circular is limited to timely completion or cancellation of any initiative in the transition plan as provided by the enclosure.

Id., attach. 3 (Letter from OMB to DOD, Nov. 17, 2003) at 1. The referenced enclosure to the letter provided additional direction to DOD from OMB, as follows:

We understand that DOD has made a determination to convert at least 10 of the 107 in-progress cost comparisons to standard competitions under the revised Circular. DOD may use the previous Circular to determine a final decision for any of the other cost comparisons identified in the transition plan for which: (a) the Department had already invested a substantial amount of resources (manpower and dollars), as of May 29, 2003, on critical steps in the cost comparison process (e.g., planning the public announcement, determining workload data and requirements for the performance work statement, and developing draft solicitations) and (b) a solicitation is issued by December 31, 2003.

* * * * *

OMB expects DOD to make final decisions for these cost comparisons no later than September 30, 2004, the completion date projected by the DOD Competitive Sourcing Official in his October 24, 2003 letter to OMB.

Id., attach. 3, enclosure at 1.

There is no dispute that the cost comparison study underway at Walter Reed met the two requirements identified by OMB for using the 1999 Circular—i.e., DOD had announced the study in 2000, presumably investing substantial resources on critical steps in the process after that time, and DOD issued the solicitation prior to the December 31, 2003 deadline. Moreover, the protester concedes that the cost comparison study here was conducted using the procedures identified in the 1999 Circular. Protest at 3 (“Because this procurement was conducted under the previous Circular, the responsible official of the MEO³] is not formally designated as the Agency Tender Official⁴], or ATO.”).

³ In the language of cost comparison studies conducted under both the 1999 and 2003 versions of OMB Circular A-76, the in-house organization proffered for performance of the services under review is called the Most Efficient Organization, or MEO. 1999 Circular, Revised Supplemental Handbook at 36; 2003 Circular at B-2.

⁴ An “agency tender official” is the government official responsible for developing and tendering the competitive agency tender. 2003 Circular at B-2. The term
(continued...)

On September 29, 2004, the MEO was compared to the offer submitted by Johnson Controls, and the Army determined that in-house performance of these services would be more economical than having them performed by contract awarded to Johnson Controls. JCWS, supra, at 2. This determination has been subjected to numerous challenges.

First, Johnson Controls filed an initial bid protest with our Office on December 10, 2004. This protest was dismissed as academic after the Army took corrective action in response to the protest. Johnson Controls World Servs., Inc., B-295529, Jan. 11, 2005. Next, Johnson Controls filed an administrative appeal with the Army. On March 30, Johnson Controls filed a second protest with our Office, which ultimately resulted in a hearing. JCWS, supra, at 3. After this hearing, the Army Audit Agency, which was serving as the agency's Independent Review Officer (IRO) under the procedures of the 1999 Circular, withdrew its certification of the MEO package.⁵ Without a certified MEO to compare to the Johnson Controls proposal, the Army again requested dismissal of the protest as academic. On June 27, our Office agreed that the IRO's withdrawal of its certification of the MEO rendered the protest academic, and the protest was again dismissed.⁶ JCWS, supra, at 3.

Between the time that our Office dismissed as academic Johnson Controls' second protest (June 27, 2005), and January 17, 2006, the Army Audit Agency, continuing to act as IRO for the agency, required the MEO to make changes to its performance package that resulted in an increase in the cost of in-house performance. On January 17, 2006, the Army revised its September 29, 2004, conclusion, and

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appears only in the 2003 Circular; there is no agency tender official under the procedures in the 1999 Circular.

⁵ Under the 1999 Circular, the review of an IRO was required to ensure that the MEO's plan for performance would comply with the solicitation's work statement. When changes to an MEO were needed to meet the requirements of the performance work statement, those changes had to be made before the IRO could certify that the MEO "reasonably establish[es] the Government's ability to perform the [performance work statement] within the resources provided by the MEO." OMB Circular A-76 Revised Supplemental Handbook (Mar. 1996) at 12; see also JCWS, supra, at 2.

⁶ For the record, one day after our June 27 dismissal of Johnson Controls' protest as academic, the protester requested a recommendation that it be reimbursed the costs of filing and pursuing its protest. In our decision on that request, we concluded that the Army had failed to investigate the substantive grounds of the protest, failed to produce documents when required, and failed to take prompt corrective action in the face of a clearly meritorious protest. Johnson Controls World Servs., Inc.—Costs, B-295529.4, Aug. 19, 2005, 2005 CPD ¶ 162 at 8. As a result, we recommended that the protester be reimbursed the costs of pursuing its protest.

announced that it would be more economical to perform base operations support services at Walter Reed using a contract awarded to IAP World Services, Inc., than to have these services continue to be performed in-house using government employees. Mr. King, an Army employee, filed this protest 10 days later. Shortly thereafter, the Army and IAP asked that the protest be dismissed on the ground that Mr. King is not an interested party to challenge the Walter Reed cost comparison study in this forum.

DISCUSSION

Mr. King explains that this protest is premised on the theory that the Army's authority to proceed under the 1999 Circular expired on September 30, 2004, and that, by operation of law, this cost comparison study is now governed by the 2003 Circular. As a result of this theory, Mr. King posits that he is the "functional and legal equivalent" of an ATO, Protest at 3, and that he has standing to challenge the result of the cost comparison study.

In our view, Mr. King's protest is actually premised on two assumptions, neither of which is supported by the facts, or the law. First, as just mentioned, Mr. King assumes that the Army's authority to proceed under the 1999 Circular has expired. This assumption is necessary to his argument because the concept of an ATO simply did not exist in the 1999 Circular. Second, Mr. King assumes that the study here is one that falls within our statutorily-granted authority to hear bid protests filed by an ATO.

We think Mr. King's arguments regarding which version of the OMB Circular governs this study cannot provide his protest with the firm footing he seeks. As explained more fully below, we found under both the 1999 Circular and the 2003 Circular that the barrier to standing in our forum was not derived from the terms of the Circular, but from the language of our bid protest statute, the Competition in Contracting Act of 1984 (CICA), 31 U.S.C. §§ 3551-56 (2000).

Prior to the 2003 revisions to the Circular, we held that the then-current language of CICA did not permit representatives of in-house government competitors to pursue a protest before our forum. American Fed'n of Gov't Employees et al., B-282904.2, June 7, 2000, 2000 CPD ¶ 87 at 3-4. As a result of the significant changes that were made in the 2003 Circular, we again considered whether an in-house entity might have standing to file a protest here regarding the conduct or outcome of a public/private competition under the 2003 Circular. Again we concluded that without a change to the language of our bid protest statute, representatives of in-house government competitors could not pursue a protest before our forum. Dan Duefrene; Kelley Dull; Brenda Neuerburg; Gabrielle Martin, B-293590.2 et al., Apr. 19, 2004, 2004 CPD ¶ 82 at 4-5.

On the same day that the Dan Duefrene decision was issued, the Comptroller General sent a letter to the cognizant congressional committees, explaining that,

because an in-house competitor did not meet the CICA definition of an interested party, GAO was required to dismiss any protest that an in-house competitor filed. In the letter, the Comptroller General recognized that policy considerations, including the principles unanimously agreed to by the congressionally-chartered Commercial Activities Panel, weighed in favor of allowing certain protests by in-house competitors with respect to A-76 competitions and, as a result, Congress might want to consider amending CICA to allow our Office to decide such protests.

Consistent with that letter, Congress expanded the definition of an “interested party” that could file a bid protest. Specifically, CICA was amended to provide that the term “interested party”

includes the official responsible for submitting the Federal agency tender in a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency.

Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 326(a), 118 Stat. 1811, 1848 (2004). In addition, Congress provided explicit direction about when this provision would become effective. Specifically, the provision explained as follows:

The amendments made by this section shall apply to protests filed under subchapter V of chapter 35 of title 31, United States Code, that relate to studies initiated under Office of Management and Budget Circular A-76 on or after the end of the 90-day period beginning on the date of the enactment of this Act.

Id. at section 326(d). As explained in the Federal Register notice implementing the change to our statute, and the resulting change in our Bid Protest Regulations, the date of enactment was October 28, 2004, and therefore, the end of the 90-day period was January 26, 2005. 70 Fed. Reg. 19,679 (Apr. 14, 2005).

Given the statutory direction quoted above, we think that even if Mr. King is correct in his argument that the Army’s authority to conduct this cost comparison study expired on September 30, 2004—and for the record, we do not think he is⁷—we see no

⁷ With respect to Mr. King’s arguments that the Army’s authority to conduct this cost comparison study under the 1999 Circular expired, we note that the words of the OMB letter to DOD state only that “OMB expects DOD to make final decisions for these cost comparisons no later than September 30, 2004.” Protest, attach. 3, enclosure at 1 (emphasis added). OMB did not state that the authority granted would expire; had it wanted to bar any action by DOD after September 30, 2004, it could have done so.

basis in the facts here to support Mr. King's necessary assumption that the cost comparison study here can properly be viewed as one that was initiated on or after January 26, 2005.

In this regard, we note that the cost comparison study here was begun in 2000, the RFP was issued in 2003, the results of the study were announced on September 29, 2004, and those results have been the subject of near-constant litigation since. At no point was the cost comparison study cancelled, either expressly or by operation of law, and at no point has the Army abandoned its study and started over. In fact, between the vitally important dates--under Mr. King's theory of this case--of September 30, 2004, and January 26, 2005, the cost comparison study was the subject of a protest before our Office that was dismissed as academic when the Army took corrective action in response to the protest. That dispute was resolved, and was followed by an administrative challenge at the Army and subsequent protests here.

Finally, we note that even when the Army again took corrective action during the summer of 2005, after a hearing before our Office, the agency took steps to remedy the problems highlighted during the hearing within the structure of the existing cost comparison study. The study was not abandoned and begun anew. Given that the facts here do not support, in any way, a conclusion that this cost comparison study was abandoned at some point and restarted after January 26, 2005--a necessary conclusion for Mr. King to have standing--we conclude that Mr. King is not an interested party to pursue this protest before our Office.

The protest is dismissed.

Anthony H. Gamboa
General Counsel